

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JASON LYONS,

Plaintiff,

16 Civ. 2036

-against-

OPINION

MICHAEL DANTUONO, individually, and as
trustee of the Bennington Family Island
Trust, and RANDOLPH J. MITTASCH, individually
and as trustee of the Bennington Island Trust,

Defendants.

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A P P E A R A N C E S:

Attorneys for Plaintiff

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Sweet, D.J.

Defendants Michael Dantuono ("Dantuono") and Randolph J. Mittasch ("Mittasch"), individually and as trustees of the Bennington Island Trust (the "Trust," collectively "Defendants") have moved pursuant to Rules 12(b)(1) and 12(b)(6) Fed. R. Civ. P. to dismiss the complaint of plaintiff Jason Lyon ("Plaintiff" or "Lyon"). Based on the conclusions set forth below, Defendants' motion to dismiss is granted.

Prior Proceedings

Plaintiff filed his complaint on March 18, 2016 alleging one count of breach of contract based on Defendants failure to pay their full obligations under the original contract between the parties.

The instant motion was taken on submission and marked fully submitted on July 14, 2016.

Facts

Plaintiff filed his complaint on March 18, 2016 alleging one count of breach of contract based on Defendants failure to pay their full obligations under the original contract between the parties.

Plaintiff and the Trust entered into a Stock Purchase Agreement ("SPA") on December 11, 2013 under which the Trust agreed to purchase 843,815 shares of common stock of Standard Metals Processing, Inc. ("SMPR") for a purchase price of \$421,907.50. Complaint ("Compl.") at ¶¶ 6-7.

Upon or shortly after closing, the Trust made an initial payment of \$200,000 for the stock. Compl. at ¶ 9. On June 25, 2014, the parties entered into an Amended and Restated Stock Purchase Agreement. Compl. at ¶ 10. The Trust offered additional consideration in exchange for the delay in payment. The purchase price was increased to \$446,907.50, of which \$246,907.50 was still payable because of the \$200,000 initial payment. Compl. at ¶ 12.

On March 4, 2015 Plaintiff and the Trust entered another amended Stock Purchase Agreement ("Second Amended Agreement") concerning this sale of stock. The parties dispute

the circumstances surrounding this agreement, though the actual agreement was annexed to this motion as Exhibit C. (Dantuono Aff., Ex. C.) In exchange for no consideration, Plaintiff conveyed to the Trust 462,991 shares of stock for \$245,200, which the March 4, 2015 agreement stated Plaintiff "has received full payment for the Purchase Price." (Dantuono Aff., Ex. C.) Plaintiff alleges that the Trust's lawyer, Stephanie Gruenhagen contacted Plaintiff and they agreed that if Lyons would split the deal, that Gruenhagen would help find a buyer for the other portion of Plaintiff's shares. The only evidence of this oral agreement in the actual amended agreement is the intention that "The Purchaser and Seller will execute another set of documents for the purchase of the remaining shares." (Dantuono Aff., Ex. C.)

The Trust has been unable to deposit these shares of stock because Plaintiff has not provided certain required documentation to the Trust's brokerage firm, which would prove that the shares were validly issued. Plaintiff is required to provide this documentation under Section 4(b) of the Stock Purchase Agreement and its subsequent amendments. (Dantuono Aff., Ex. C, Section 4(b).)

Plaintiff alleges breach of contract to collect for the unpaid portion of the original purchase price for the outstanding shares, which amounts to \$246,907.50.

The Applicable Standard

On a motion to dismiss pursuant to Rule 12(b), all factual allegations in the complaint are accepted as true, and all inferences are drawn in favor of the pleader. *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1174 (2d Cir. 1993). A complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007)). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 663 (quoting *Twombly*, 550 U.S. at 556). In other words, the factual allegations must "possess enough heft to show that the pleader is entitled to relief." *Twombly*, 550 U.S. at 557 (internal quotation marks omitted).

Additionally, while "a plaintiff may plead facts alleged upon information and belief 'where the belief is based on factual information that makes the inference of culpability plausible,' such allegations must be 'accompanied by a statement of the facts upon which the belief is founded.'" *Munoz-Nagel v. Guess, Inc.*, No. 12-1312, 2013 WL 1809772, *3 (S.D.N.Y. Apr. 30, 2013) (quoting *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010)); *Prince v. Madison Square Garden*, 427 F. Supp. 2d 372, 384 (S.D.N.Y. 2006); *Williams v. Calderoni*, No. 11-3020, 2012 WL 691832, at *7 (S.D.N.Y. Mar. 1, 2012)). The pleadings, however, "must contain something more than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Twombly*, 550 U.S. at 555 (citation and internal quotation omitted).

The Court Can Review the March 2015 Amended Agreement

On a motion to dismiss, Defendants must show that Plaintiff has not pled a valid claim on which relief can be granted. Here, Defendants argue that Plaintiff failed to state a valid claim for breach of contract because a 2015 Second Amended Agreement makes the claim made in the Complaint moot.

In opposition, the Plaintiff argues that the 2015 Second Amended Agreement is invalid because of an oral contract formed between Gruenhagen and Lyons to find a buyer for the outstanding unsold shares. Plaintiff argues that this oral contract required Defendants to find a buyer for the outstanding shares as a condition precedent to the 2015 Second Amended Agreement.

The 2015 Second Amended Agreement was not mentioned nor attached to the Complaint and therefore the Court must first decide if it can consider the March 4, 2015 Second Amended Agreement on this motion to dismiss. "In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). Since the 2015 Second Amended Agreement was not alleged in the Complaint nor attached as an exhibit, it can only be considered if it was incorporated by reference.

In a similar case, a District Court determined it would not consider a Stock Purchase Agreement submitted by the

Defendant on a motion to dismiss because it had not been attached to the complaint. *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991). However, the Second Circuit overturned the decision because while the Stock Purchase Agreement and other documents were not attached to the complaint, they should be considered on a motion to dismiss because these were documents "plaintiffs had either in its possession or had knowledge of and upon which they relied in bringing suit. It did not lack notice of those documents; these papers were integral to its complaint." *Id.* Likewise, in this case Plaintiff had possession and knowledge of the March 2015 Second Amended Stock Purchase Agreement. *Id.* Further, while the Second Amended Agreement may not substantiate Plaintiff's claim for breach, it is integral to the facts alleged in the Complaint. Further, "even if a document is 'integral' to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document." *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006). Here, Plaintiff has not raised any issues concerning the authenticity of the Second Amended Agreement.

The March 2015 Amended Agreement Is a Valid Substitute Agreement

Once considering the March 2015 Amendment, the parties dispute whether the complaint states a valid cause of action for breach of contract. The parties dispute whether the conversation between Gruenhagen and Lyons should invalidate the fully executed March 4, 2015 Second Amended Agreement.

The parol evidence rule "prohibits the introduction of extrinsic evidence to vary or add to the terms of contract, especially where such contract contains a merger clause." *NAB Const. Corp. v. Consolidated Edison Co. of New York, Inc.*, 222 A.D.2d 381, 381, 636 N.Y.S.2d 37, 38 (1st Dep't 1995). This rule often "precludes introduction of a purported oral agreement." *Id.* In this case, the alleged oral agreement is parol evidence, particularly in light of the merger clause defining that "This Agreement constitutes the entire agreement among the Parties . . . There are no restrictions, promises . . . other than those set forth herein." (Dantuono Aff., Exs. B and C, Section 5(d).) This is a valid merger clause and precludes the parol evidence of a conversation between Gruenhagen and Lyons.

The Court must determine whether the Second Amended Agreement was valid since there was no consideration to the

seller to split the stock purchase. "[T]he parties may intend that a new agreement, though executory, will immediately discharge the existing obligation. That is a substituted agreement." *Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 384, 624 N.E.2d 995, 604 N.Y.S.2d 900 (1993) (internal citations omitted). In this case, the Second Amended Agreement is a substituted agreement because it did immediately discharge the existing obligation with an intention that "The Purchaser and Seller will execute another set of documents for the purchase of the remaining shares." (Dantuono Aff., Ex. C.) This statement of the parties' future intent is merely illusory and is not binding. The only valid agreement between the parties is the sale of half of the shares (462,991) for the purchase price of \$245,200.

The Plaintiff has not stated a valid cause of action for breach of the 2014 First Amended Stock Purchase Agreement because the Second Amended Agreement provides that "the Seller has received full payment for the Purchase Price" of the 462,991 shares and the only remaining obligation between the parties that they "will execute another set of documents for the purchase of the remaining shares" is not binding.

Conclusion

Based on the conclusions set forth above, Defendants' motion to dismiss is granted.

It is so ordered.

New York, NY
November 14, 2016



ROBERT W. SWEET
U.S.D.J.